No. 75-1306

IN THE

Supreme Court of the United States

October Term, 1975

No.....

ERIC L. HAGA,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER T. BAYLEY
King County Prosecuting Attorney

By LEE D. YATES
Senior Deputy Prosecuting Attorney

and THOMAS H. WOLFENDALE
Deputy Prosecuting Attorney

Attorneys for Respondent

Office and Post Office Address:
W 554 King County Courthouse
Seattle, Wa. 98104

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

Constitutional Provisions

IN THE

Supreme Court of the United States

October Term, 1975

No......

ERIC L. HAGA,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

Petitioner, Eric L. Haga, has twice been found guility by jury verdict of the premeditated murders by strangulation of his wife and infant daughter. The murders occurred on 6 July 1966, in the city of Kent, county of King, state of Washington. On 30 August 1971 the defendant was charged with two counts of murder in the first degree and a jury found him guilty of both counts in December, 1971. His case was appealed to the Court of Appeals for the State of Washington, Division I, and his conviction was reversed on an evidentiary matter not at issue in the petition for certiorari. Following the reversal on appeal, the defendant was promptly retried for the murders and was again found guilty by a second jury on both counts in

December, 1973. Haga's conviction in the second trial was affirmed by the Court of Appeals, Division I, for the State of Washington, and a subsequent petition for review to the Supreme Court of the state of Washington was denied on 15 December 1975.

I.

QUESTION FOR REVIEW

Respondent does not accept petitioner's framing of the issue for review in his petition. Petitioner alleges that his due process rights under the Fourteenth Amendment to the United States Constitution were violated in five respects, including in subparagraph (d) an allegation that he had been prejudiced by the delay in prosecution. Respondent urges that the only issue to be considered in the petition for certiorari is whether a petitioner who is not charged until five years after the commission of the crime has had his due process rights under the Fourteenth Amendment to the United States Constitution violated. It is submitted that the two-year time period between the first trial and his prompt retrial following a reversal on appeal does not constitute a due process issue. It is further submitted that there was no evidence that the petitioner was prejudiced in any respect by the delay of prosecution, two trial courts and three appellate courts having rejected any contention of prejudice resulting from the delay in charging. The only arguable issue now before the court in the petition for certiorari is whether the defendant, solely because of a five-year delay in charging and when no prejudice can be shown, has had his due process rights under the Fourteenth Amendment to the United States Constitution violated.

II.

STATEMENT OF THE CASE

At 6:45 a.m. on 6 July 1966, Marshal Lewis, a neighbor living across the street from the petitioner Eric Haga, prepared to leave his house for work. While starting his car engine he glanced towards the living room of the Haga residence and noticed that the drapes, uncharacteristically, were pulled open (St. 723). Mr. Lewis also noticed a person, giving the impression of a man with dark bulky clothing near the kitchen table, facing away from the witness, and bending slightly down toward the table (St. 724, 725, 726, 727).

One hour later, at 7:45 a.m., Eric Haga, dressed in his dark bathrobe and slippers and carrying his 2½-year-old daughter, Paula, appeared at the back door of his next door neighbor James Nathan, saying, "There was something the matter with Judy" (St. 578, 612, 613). Mr. Nathan and the petitioner returned to the Haga residence Where Nathan observed much of the living room furniture overturned and an ashtray, woman's purse, cigarette butts, papers, magazines, and other household articles strewn about (St. 579-581). After a few moments, Nathan saw the petitioner's wife, Judith Ann Haga, lying under blankets on the living room floor (St. 579). Nathan first tried to telephone a doctor but found the Haga phone line dead (St. 582). The petitioner then pointed at his wife and said, "There was something on Judy's neck" (St. 583). Nathan upon closer examination discovered a necktie, later determined to be that of Eric Haga, wrapped tightly around her neck (St. 583, 915). A short time later the petitioner's seven-month-old daughter Peri Lynn was

discovered in her crib strangled with a pink ribbon from a stuffed toy animal. With the aid of a kitchen knife Nathan removed the garrotes from both victims as the petitioner stood by without offering assistance of any kind (St. 598, 599).

Mr. Nathan returned to his residence and phoned the police. Members of the King County Sheriff's Office arrived shortly after 8:00 a.m. Upon the officers' arrival the petitioner was told to remain next door at the Nathan's while police conducted the initial investigation (St. 679). One of the officers securing the Haga residence, William Gorsline, noted that curlers and bobby pins were on the floor of the bathroom and a bathroom rug was disarrayed and pushed partly into the central hallway, indicating a possible scene of struggle prior to the victim Judith Haga's being dragged into the nearby living room (St. 678). Detective Sergeant George Helland also noted the condition of the bathroom (St. 649).

The attention of another deputy securing the scene, Kenneth Trainor, was directed by the petitioner to the rear patio portion of the house. The petitioner very excitedly pointed to what he claimed were cut telephone wires at the back of the house. He explained to Trainor that as he was coming back from the Nathan residence, he dropped his cigarette lighter and in bending over to pick it up he observed the cut telephone wires (St. 685-686). Although Trainor looked very closely, he could not see any break in the telephone wires. Finally, after placing his fingers beneath the wire underneath the plastic cover protecting the wires, the deputy was able to pull the wires clear of the house and could discern a break

(St. 687). Sometime later Detective Sergeant George Helland, chief investigating officer at the scene, checked the telephone wire connection. He found that it was necessary to lift the plastic cap that covered the terminal ends to observe the cut (St. 643). In his investigation of the crime scene, Sergeant Helland also observed what appeared to be one cereal bowl, recently used, located on the dining room table in the approximate location that Mr. Lewis had observed the figure of a man at 6:45 a.m. (St. 636).

Dr. Gale Wilson, King County Medical Examiner, Dr. Karl Mottet, Chief Pathologist at the University of Washington, and Dr. Bruce Beckwith, Director of Pathology of Children's Orthopedic Hospital, placed the time of death of both victims between midnight and 3:00 a.m. on 6 July 1966 (St. 755, 1163, 1174). These estimates of the time of death were nearly five full hours prior to the time Marshal Lewis observed the figure of a man in the living room of the Haga residence. The possibility that someone other than petitioner killed the victims and remained for several hours in the residence while the petitioner was sleeping was, of course, highly unlikely.

After the homicides the petitioner was questioned, but not arrested, by Chief Thomas Nault of the King County Sheriff's Department. At that time the petitioner denied committing the crimes, claiming that he slept the entire time when the two violent deaths occurred a few feet from his bedroom.

An autopsy of Judith Haga on 6 July revealed that two fingernails on her left hand were split, rough and broken (St. 753). At an inquest held shortly after the homicides

Haga was aware of the fact that fingernail scrapings had been taken by the police from Judith Haga. While FBI laboratory tests failed to be of any assistance in this regard, the petitioner apparently believed that at the time of the inquest the police had discovered his skin under his wife's fingernails. At the inquest Haga told James Nathan the incredible story that his skin must have been found because Haga and his older daughter Paula had been playing and that Paula had scratched him, and that his wife Judith must then have cleaned underneath Paula's fingernails with her own nails (St. 605-606). The story also conflicted with the two long scratches that were visible on the petitioner's hand immediately after the homicides (St. 694).

The evidence at the trial also proved that in April, 1965, Judith Haga met one Dennis G. Harman, had an affair with him, and lived with him for a short time in Oregon (St. 428-430). In May, 1965, during a period of separation between the petitioner and Judith Haga, Eric Haga came home unexpectedly and found his wife with Dennis Harman. The petitioner became extremely upset, saying "Someday I'll fix both of you" (St. 435). In March of 1965, Judith Haga became pregnant with the victim Peri Lynn, a child that the petitioner believed was not his own. Additionally, Loren Potter established that at noon of 5 July 1966, he gave Harman his paycheck in Casper, Wyoming (St. 788). This corroborates Harman's version of his whereabouts (St. 439). It is obviously inconsistent with the defense argument that Harman might be the mysterious "prowler" that petitioner claimed to have seen about noon on 5 July 1966 (St. 899).

In April of 1966, the petitioner, a parttime race driver, became interested in purchasing a Mercedes Benz auto-

mobile for sale in Oregon. On 6 April 1966, a previously arranged double indemnity insurance policy on his wife and children came into effect. On 24 June 1966, the petitioner attempted to borrow $3,000 from the National Bank of Commerce to finance the sale of the Mercedes. In his loan application, the petitioner lied repeatedly and extensively regarding his personal assets and his status in the company for which he was employed as a draftsman (St. 537-542). The loan officer at the National Bank of Commerce, James Money, discovered that the petitioner had falsified his loan application and refused to authorize the loan for the Mercedes Benz. Twelve days after Eric Haga attempted to borrow the money from the bank, and three months to the day from the time he had taken out insurance on his family's lives, Judith and Peri Lynn Haga were dead. Eric Haga collected $16,722.26 in insurance money.

III.

REASONS FOR DENYING WRIT

A. Two Washington Appellate Courts in the Instant Cause Did Make an Independent Examination of the Facts in Deciding Petitioner's Due Process Argument

Petitioner has correctly set out the test for review of constitutional issues by an appellate court. *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959). What petitioner has neglected to do is set out the very explicit comments by both the Washington Court of Appeals who reviewed and rejected petitioner's delay claims after making an independent examination of the facts.

> *Our review of the record* of the trial persuades us that the trial judge did not err in concluding that Haga

failed to demonstrate that he was actually prejudiced by the preaccusation delay.

(Emphasis added)

Pet. App. B-5.

. . . We conclude that *upon an evaluation of the entire proceedings* the showing is short of actual prejudice.

(Emphasis added)

Pet. App. C-9.

It is also apparent by the most cursory examination of the opinions that both appellate courts spent considerable time in reviewing each and every one of the individual allegations of prejudice which petitioner asserted and now asserts in his petition for certiorari. *See* Pet. App. B-4 through B-6 and C-6 through C-9.

B. *Barker v. Wingo* Is Inapposite to Petitioner's Argument of Preaccusation Delay Resulting in Prejudice

In *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973), Petitioner's Appendix C-1, the applicability of *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972) was carefully considered. The court examined the three criteria of the *Barker* case and determined all but one to be inapplicable.

> Distinctions must be made between the speedy trial analysis applicable to post accusation delays and the due process analysis relevant to pre-accusation delays. First, citizens cannot be expected to periodically search their conscience and demand that the state grant them exculpation. "There is no constitutional right to be arrested" [Cite omitted]
>
> Second, the sort of prejudice likely to result from pre-accusation delays differs from that caused by post-accuseation delays. The *Barker* case identifies three ramifications of post-accusation delay which may prejudice the defendant: (1) pretrial incarceration, (2) anxiety and concern of the accused, and (3) impairment of the defense. Only the impairment of the defense seems relevant to this case. . .

8 Wn. App. 481, 485. Pet. App. C-5.

Additionally, in the instant cause, there was no arrest and detention of petitioner. There is nowhere in the record nor is there cited in petitioner's application for certiorari any reference to sustain petitioner's claim of anxiety or concern during the five-year period between the murders and his charging.

C. The Law and the Facts Do Not Sustain Petitioner's Claim of Prejudice by Impaired Defense

Under a due process analysis of a pre-accusation delay three Washington appellate courts considered the twice-convicted petitioner's claims of prejudice. Both Washington Courts of Appeal decisions point out the vigorous and extensive nature of the petitioner's defense presented in each trial as well as the weakening of the state's case by the passage of time (Pet. App. B-5, C-8).

The petitioner's own cases dealing with prejudicial effect of delay sustain respondent's argument and demand denial of the petition for writ of certiorari.

United States v. Golden, 436 F.2d 941 (8th Cir. 1971) is the foundation from which petitioner argues prejudicial effect. *See* Pet. Br., page 12. Crucial to examination of that case is an appreciation of petitioner's excisement of a paragraph which sustains respondent and is directly contrary to the tone which petitioner would set by the quote from the case. The following paragraph is the deleted portion and holds as follows:

> It is well established law that a defendant claiming

impairment of his defense by delay *must show specifically and not by mere conjecture wherein his defense has been impaired. Hodges v. United States, supra; United States v. Ewell, supra; United States v. Hammond,* 360 F.2d 688 (2nd Cir. 1966). *Thus a mere claim of general inability to reconstruct the events of the period in question is insufficient to establish the requisite prejudice for reversal on denial of due process. United States v. Ewell, supra; Dancy v. United States,* 129 U.S. App. D. C. 413, 395 F.2d 636 (1968); *United States v. Hammond, supra. Nor may a defendant's claim of prejudice be insubstantial, speculative or premature. Particular circumstances of the delay other than a general inability to recollect or reconstruct events must be shown. Dancy v. United States, supra; United States v. Hammond, supra.*

(Emphasis added)

436 F.2d 941, 943.

Robinson v. United States, 459 F.2d 847 (1972) should likewise be more carefully analyzed than in petitioner's brief. The case involved delay in a narcotics sale allegation. There was a general assertion by the defendant that there had been prejudice due to the delay between the alleged sales and his arrest and charge. His claim was clearly one of due process. The court made the following observation regarding grounds of prejudice and the burdens to meet.

> . . . The first, and the most common, embraces those cases in which the accused complains that the delay damaged his ability to present his defense. The burden is upon him to come forward with "a plausible claim" of prejudice and a frequent claim is that he cannot remember where he was during the short period of time the narcotic transaction consumed, usually some months before. The length of the delay, even if ordinarily reasonable, is obviously relevant in assessing injury of this sort. . . . Another variation of the claim that the defense has suffered from the delay is the assertion that a material witness has become unavailable. Any loss of such a witness which is chargeable to the delay weighs heavily against the government in these cases.

459 F.2d 847, 852-853.

Upon examination of the specific facts in *Robinson* it was further alleged by appellant that the death of his sister, with whom he had been living at the time of the offenses, sustained his claims of delay and prejudice. Though the court was uninformed as to the time of her death, the court did make the following observation about the claim.

The claim was much like the claim Haga now seeks to allege.

> . . . The only claim appellant makes is that his sister might, in some unelucidated manner, have helped him reconstruct his activities on the days in question. We conclude, then, that the probability of damage to the appellant's ability to defend himself was not significant enough to warrant upsetting his conviction.

459 F.2d 847, 854.

The *Robinson* court goes on to review a second category of delay problems related to the kind of proof that the government presents, *e.g.* the reliability of the techniques by which the accused is identified as the offender. The court then appropriately concludes as to both categories that,

> Our decisions lay down no rules as to the weight to be assigned to these factors; they call, instead, for judicial judgment of the most delicate type. . . .

459 F.2d 847, 853.

This is significantly and precisely the test of delicate judgment and balance which two Washington Courts

of Appeal have exercised in the review of two Washington trial courts, who themselves utilized the same judicial judgment citing *United States v. Marion,* 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971):

> To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve the delicate balance based on the circumstances of each case.

United States v. Marion, supra, at 325, Pet. App. B-4 and by implication C-3 through C-9.

United States v. Norton, 504 F.2d 342, *cert. denied* 94 S. Ct. 790 (1975) was a case clearly distinguishable from *Haga.* In *Norton,* the 8th Circuit affirmed appellant's conviction in a narcotics transaction where he had not been charged until five and one-half months had elapsed from the time of the crime. In *Norton* an informant had been present during the narcotics transaction and had since been murdered. The court held that no showing had been made of prejudice. The court further noted that the accused did have the right to interview the informant before trial and that the government did have the burden of demonstrating that the informant did not possess exculpatory evidence.

In *Norton,* an actual eyewitness to the alleged crime was later found to be unavailable and the government had particular access to the informant. In *Haga,* however, the alleged defense witnesses that were "unavailable" for trial were neither eyewitnesses to the crime nor under the control of the government. Their testimony was hearsay, cumulative to other witnesses who had previously testified, or went to matters that were collateral to any material issue. The defendant testified at length at both trials and

the jury chose to disbelieve his account of sleeping through the killings in each trial. *Norton* must be read in its context to limit the requirement that the government has a burden to demonstrate that a missing witness did not possess exculpatory evidence to the situation where the witness is peculiarly under control of the government.

> If the accused is denied this opportunity (to obtain the testimony of the informant) and the informant becomes unavailable, the issue becomes one for the court. In that event, we have held that the government must bear the burden of demonstrating that the informant did not possess exculpatory evidence.

United States v. Norton, at 345.

Petitioner then incorrectly asserts that the same criteria in *United States v. Golden, supra,* was applied by the 8th Circuit in *United States v. Barket,* 18 Crim. L. R. 2429 (January 28, 1976, a 2-1 opinion). The cite used in the *Barket* case to *Golden* is preceded by a Cf. which indicates that the cited authority supports a statement, opinion or conclusion of law different from that in text but sufficiently analogous to lend some support to the text.

Nevertheless, one must assume the District Court and the United States Court of Appeals in *Barket* utilized the entire *Golden* test (discussion, *supra*) to determine the assertions of prejudice were not speculative nor too vague, *i.e.* the "delicate judgment." By the same token in the instant cause, two trial courts and three appellate courts have reached the same judgment and have unanimously drawn the conclusion that petitioner has failed to make out his prejudice. As the *Barket* court points out:

> A test for judging the reasonableness of preindictment delay comparable to that for assessing whether the defendant was prejudiced by the delay has, however,

> not yet been clearly developed. Lacking a predetermined standard, *we employ a "delicate judgment" based upon the circumstances of each case. United States v. Marion* at 325, balancing a combination of factors such as those employed in *Barker v. Wingo* [cite omittted] for assessing the impact of the denial of speedy trial after arrest.

(Emphasis added) 18 Crim. R.R. 2429, 2430.

Barket uses the same language and intent of the Washington Courts of Appeal as noted in petitioner's appendix B-4.

Moreover in the *Barket* case it was simply not the 47-month preindictment delay nor the fact that witnesses had died or had difficulty remembering which compelled the harsh and extreme remedy of dismissal. The court quite frankly said that the following factors were significant and entered into their judgment:

> . . . In this respect we deem it significant that the United States Attorney's own staff expressed reservations as to the merits of the government's accusation. It is also significant that the instant loan was in fact ultimately repaid in full by Barket and others, not including Gepford, the maker of the note, long prior to this indictment. There is no evidence of any kind that the bank intended to charge off the loan and thus make a political contribution. Relevant also, although not binding in the present case, is the fact that the statute of limitations applicable to section 610 offenses has now been reduced to three years ° ° ° In the future, the amendment will serve to protect similar defendants from the extreme difficulties of recreating the circumstances of political activity out of the distant past. In the present case, by the same token, Congress' decision to shorten the limitations period is not entirely irrelevant to our assessment of the reasonableness of the 47-month delay.

18 Crim. L.R. 2429, 2430.

In the instant cause there is no statute of limitations for the crime of murder in the first degree in the state of Washington. Unlike the repayment of a loan the lives of Judith Haga and Peri Lynn Haga cannot be restored. And it is of some import that the *Barket* court, cited as authority by petitioner, would employ, as a factor in determining prejudice, the absence or presence of a statute of limitations and any change in that statute of limitations. Petitioner has asserted in the courts below that such factoring or incorporation of the statute of limitations test is improper.

On burdens to be met, the opinion of Chief Justice Gibson in *Barket* asserts that the government must bear the burden of demonstrating the lack of exculpatory evidence from missing witnesses. Citation is made to *United States v. Norton, supra.* As already noted above, *United States v. Norton* was peculiar to a circumstance of a transactional informant witness to a drug sale. One must assume that the court's reliance upon *Norton* means that the dead or forgetful witnesses in *Barket* were transactional witnesses who in fact viewed or directly participated in the alleged unlawful activity. Obviously, in the instant cause there was only one witness to the murder of the woman and young child and that was the petitioner himself.

The significance of petitioner's cases, which as noted above support respondent's position, can be found in a universal acknowledgment that trial and appellate courts must make the most careful and delicate judgments in these cases. Even the *Barket* case can stand for no more than an affirmation by the United States Court of Appeals of the United States District Court's judgment and weighing of all the factors under the Due Process clause of the

Fourteenth Amendment. It is with particular importance that respondent points to the fact that two trial judges, six Washington State Courts of Appeal judges and the Washington State Supreme Court have independently and diligently made the same delicate judgment of petitioner's cause. The United States Supreme Court should adhere to these judgments do the same.

IV.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied and the decision of the court below should be affirmed.

Respectfully submitted,

CHRISTOPHER T. BAYLEY
King County Prosecuting Attorney
By LEE D. YATES
Senior Deputy Prosecuting Attorney
and THOMAS H. WOLFENDALE
Deputy Prosecuting Attorney
Attorneys for Respondent